

NOTICE

Decision filed 12/30/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 080188-U

NO. 5-08-0188

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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BANK OF AMERICA, N.A., Successor in Interest by Merger with NationsBank, NA,	) Appeal from the
	) Circuit Court of
Plaintiff and Counterdefendant-Appellant,	) Jefferson County.
	)
v.	)
	) No. 05-CH-25
	)
ROSS E. BIRD, a/k/a Ross Eugene Bird,	)
	)
Defendant and Counterplaintiff-Appellee,	)
	)
and	)
	)
VICKI C. BIRD, a/k/a Vicki Carol Bird; Unknown	)
Owners; and Nonrecord Claimants,	) Honorable
	) Robert W. Lewis,
Defendants.	) Judge, presiding.

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PRESIDING JUSTICE DONOVAN delivered the judgment of the court.  
Justices Chapman and Spomer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Section 7-102 of the Illinois Notary Public Act (5 ILCS 312/7-102 (West 1996)) modifies but does not preempt common law liability for employers of notaries public, and so at common law, the minimum duty of an employer of a notary is to not consent to the notary's official misconduct. Thus, a plaintiff who files a common law claim against the employer of a notary must show, at a minimum, that the employer had some knowledge of the notary's misconduct.

¶ 2 The plaintiff, Bank of America, N.A., successor in interest by merger of NationsBank, NA (Bank of America), filed an action in the circuit court of Jefferson County to foreclose its two mortgage liens on a house jointly owned by the defendants, Ross E. Bird and Vicki C. Bird. Ross Bird filed a counterclaim alleging negligence, fraud, and violations of the

Illinois Notary Public Act (Notary Act) (5 ILCS 312/1-101 *et seq.* (West 1996)). Bank of America filed a motion for summary judgment on all counts of the counterclaim and a separate motion to strike Ross Bird's jury demand. The circuit court denied the motions but certified the following questions of law for interlocutory appeal pursuant to Supreme Court Rule 308(a) (eff. Feb. 1, 1994): "(A) Does the Notary Public Act exclusively govern the liability of the employer of a notary public and preempt common law theories of recovery against the employer? (B) Whether Ross Bird is entitled to a jury trial on his claim under the Notary Public Act?" On appeal, we determined that the Notary Act does not provide an exclusive remedy and does not preempt common law theories of liability against the employers of notaries and that there is a right to a jury trial on a claim for civil damages brought pursuant to the Notary Act. *Bank of America, N.A. v. Bird*, 392 Ill. App. 3d 621, 911 N.E.2d 1239 (2009).

¶ 3 The Illinois Supreme Court denied Bank of America's petition for leave to appeal but issued a supervisory order (*Bank of America, N.A. v. Bird*, \_\_\_ Ill. 2d \_\_\_, 941 N.E.2d 165, (2011) (nonprecedential supervisory order on denial of leave to appeal)), directing us to vacate our judgment and to reconsider the case in light of *Vancura v. Katris*, 238 Ill. 2d 352, 939 N.E.2d 328 (2010), to determine whether a different result is warranted. In accordance with the directions of the supreme court, we have vacated our prior judgment and reconsider this case in light of the reasoning and holdings in *Vancura*.

¶ 4 Bank of America filed an action to foreclose its mortgage liens on a home jointly owned by Ross Bird and Vicki Bird. The liens arose from two loans that were made in 1997. Ross Bird filed an answer and therein affirmatively stated that he did not affix his signature or authorize his signature to be affixed to the mortgage documents and that he is not liable for the outstanding debt thereon. Ross Bird also filed affirmative defenses and a three-count counterclaim and therein alleged that his wife, Vicki, forged his signature on a mortgage

document covering a \$44,000 loan and on a separate mortgage document covering a \$20,000 home equity line of credit; that a notary public employed by Bank of America notarized the signatures on the mortgage documents without satisfactory evidence that the purported signatures of Ross Bird were genuine; and that Bank of America was vicariously liable for its employee's negligence, fraud, and breach of the Notary Act.

¶ 5 Bank of America moved for a summary judgment on all counts of the counterclaim on grounds that the liability of an employer for the misconduct of its notary public is exclusively governed by the Notary Act; that an employer is not liable under the Notary Act unless it consented to the misconduct; and that there is no allegation nor any evidence that it consented to the alleged misconduct of its notary. The circuit court denied Bank of America's motion for summary judgment.

¶ 6 Subsequently, Bank of America filed a motion to strike or limit Ross Bird's demand for a jury trial on the counterclaim. Bank of America asserted that the Notary Act does not provide a right to a jury trial in an action alleging civil damages arising from violations of its provisions and that the counts of the counterclaim alleging negligence and fraud are preempted by the Notary Act and should not be tried at all, much less by a jury.

¶ 7 The circuit court denied Bank of America's motion to strike the jury demand, finding that under proper circumstances an employer may be liable for a notary's breach according to principles of agency. The court found that Bank of America's motion to strike the jury demand and its order involved questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal may materially advance the termination of the litigation, and it identified the aforementioned questions for certification pursuant to Supreme Court Rule 308.

¶ 8 In an interlocutory appeal under Rule 308, our review is strictly limited to the certified questions presented, and we do not render any opinion on the underlying rulings of the trial

court. *Long v. Elborno*, 397 Ill. App. 3d 982, 988, 922 N.E.2d 555, 560 (2010). A Rule 308 appeal involves questions of law that are reviewed *de novo*. *Eads v. Heritage Enterprises, Inc.*, 204 Ill. 2d 92, 96, 787 N.E.2d 771, 773-74 (2003).

¶ 9 The first certified question is whether the Notary Act exclusively governs the liability of the employer of a notary public and preempts common law theories of recovery.

¶ 10 The Notary Public Act of 1872, as amended, was repealed effective July 1, 1986, (Ill. Rev. Stat. 1985, ch. 99, par. 1 *et seq.*), and a new act with substantive amendments became effective on July 1, 1986 (Ill. Rev. Stat. 1985, ch. 102, par. 201-101 *et seq.*). In enacting the 1986 version of the Notary Act, the legislature restated and updated certain provisions of the Notary Public Act of 1872, and it added some provisions that were not a part of the 1872 version. The additions included a statement of statutory purposes (5 ILCS 312/1-102) and a section regarding the liability of the employer of a notary public (5 ILCS 312/7-102). The Notary Act expressly states that the underlying purposes are: "(1) to simplify, clarify, and modernize the law governing notaries public; and (2) to promote, serve, and protect the public interest." 5 ILCS 312/1-102(b). In repealing the Notary Act of 1872 and in enacting the 1986 Notary Act, the legislature did not expressly or impliedly indicate that it intended to abolish all actions in equity or common law that preexisted the original legislation.

¶ 11 Section 7-102 of the Notary Act addresses the liability of the employer of a notary public and provides, "The employer of a notary public is also liable to the persons involved for all damages caused by the notary's official misconduct, if: (a) the notary public was acting within the scope of the notary's employment at the time the notary engaged in the official misconduct; and (b) the employer consented to the notary public's official misconduct." 5 ILCS 312/7-102. The threshold issue is whether section 7-102 exclusively governs the liability of the employer of a notary and preempts common law theories of recovery against the employer. The issue has been recently considered in the Illinois Supreme Court's opinion

in *Vancura v. Katris*, 238 Ill. 2d 352, 939 N.E.2d 328 (2010).

¶ 12 In *Vancura*, the plaintiff alleged that a notary public had notarized the plaintiff's forged signature on a mortgage assignment. The plaintiff sought to hold the notary's employer liable for the notary's malfeasance under common law theories of negligent supervision and training and a statutory theory of implied consent under section 7-102 of the Notary Act. Following a bench trial, the circuit court entered judgment for the plaintiff on all theories. The appellate court affirmed the judgment for the plaintiff on the common law counts, but it vacated the judgment under section 7-102, finding that the evidence did not support a finding that the employer had actively or impliedly consented to the notary's official misconduct. The Illinois Supreme Court granted the employer's petition for leave to appeal and determined that a central question on appeal was whether, in light of general common law principles and the statutory scheme established in the Notary Act, the employer could be held liable for negligent supervision of its notary. *Vancura*, 238 Ill. 2d at 374, 939 N.E.2d at 342.

¶ 13 In considering the question, the supreme court noted that the employer began its argument by conceding that the remedy provided in section 7-102 of the Notary Act did not preempt a common law action against the employer of a notary. *Vancura*, 238 Ill. 2d at 374, 939 N.E.2d at 342-43. The supreme court acknowledged the employer's concession without further comment or correction and proceeded to consider the employer's argument that section 7-102 fixed the measure of the common law duty owed by employers of notaries so that employers could not be held liable on the basis of a duty found outside the Act. *Vancura*, 238 Ill. 2d at 374, 939 N.E.2d at 342-43. The supreme court stated that "the mere existence of a statute establishing legal duties for employers of notaries does not foreclose the possibility of a common law negligence action based on an extra-statutory duty of care," but it also acknowledged that the legislature may intentionally foreclose or limit such an

action through statutory provisions that alter the common law. *Vancura*, 238 Ill. 2d at 377, 939 N.E.2d at 344.

¶ 14 The supreme court then examined the provisions in section 7-102 of the Notary Act to determine whether the legislature had modified the common law. The court noted that the second prong of the statute states that an employer may be found liable for the acts of a notary only where the employer consented to the notary public's official misconduct. *Vancura*, 238 Ill. 2d at 378, 939 N.E.2d at 344. Because "consent" is not defined in the Notary Act, the supreme court consulted Black's Law Dictionary, which defines the term in relevant part as "[a]greement, approval, or permission as to some act or purpose" (Black's Law Dictionary 323 (8th ed. 2009)). Using that definition, the court reasoned that an employer could not agree to, approve of, or permit an act of which it has no knowledge. *Vancura*, 238 Ill. 2d at 378, 939 N.E.2d at 345. The court concluded that in enacting section 7-102 of the Notary Act, the legislature intended that the employer of a notary could be liable where the employer has "some minimum threshold of knowledge" of the notary's misconduct. *Vancura*, 238 Ill. 2d at 378, 939 N.E.2d at 345. The court found that the statutory liability of an employer of a notary under section 7-102 of the Notary Act conflicted with the liability of an employer under common law theories of *respondeat superior* and direct liability. *Vancura*, 238 Ill. 2d at 378-79, 939 N.E.2d at 345.

¶ 15 The supreme court held that section 7-102 of the Notary Act was intended to modify the common law liability for employers of notaries; that the minimum duty of an employer of a notary at common law "extends only as far as the duty established by section 7-102 of the Act"; that the minimum duty of the employer of a notary under the common law is "to not consent to the official misconduct of its employees"; and that a plaintiff who brings a common claim against the employer of a notary must show, at a minimum, that the employer had some knowledge of the notary public's misconduct. *Vancura*, 238 Ill. 2d at 379, 939

N.E.2d at 345.

¶ 16 Consistent with the reasoning and holdings in *Vancura*, we conclude that the answer to the first question is no. The Notary Act does not preempt but does modify common law liability against employers of notaries. In order to establish a common law claim against a notary's employer, a plaintiff must establish that the employer consented to the notary's misconduct. Thus, a plaintiff must show, at a minimum, that the employer had some knowledge of the notary's misconduct. We reiterate that our task in a Rule 308 appeal is strictly limited to examining proper certified questions of law and that we are not to rule on the propriety of any underlying orders. *Long*, 397 Ill. App. 3d at 988, 922 N.E.2d at 560. Therefore, we are remanding this case to the trial court with directions to the trial court to reconsider its ruling on Bank of America's motion for summary judgment in light of this decision. Given our disposition, we find that it is neither necessary nor advisable to consider the second certified question because it does not appear that answering it would effectively advance the resolution of this litigation, and so we decline to answer it.

¶ 17 Accordingly, the answer to the first certified question is no, and we decline to answer the second certified question. This case is remanded to the circuit court with directions to reconsider Bank of America's motion for a summary judgment on Ross Bird's counterclaim in light of this decision and for further proceedings consistent with this decision.

¶ 18 First certified question answered; second certified question not answered; cause remanded with directions.